Neutral Citation Number: [2024] EWHC 847 (Admin)

Case No: AC-2022-LON-003486

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2024

Before :

His Honour Judge Siddique sitting as a Deputy High Court Judge

Between :

The King (on the application of) **IDEALING.COM LIMITED**	**Claimant**
- and –	
FINANCIAL OMBUDSMAN SERVICE LIMITED	**Defendant**

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- -

Oliver Assersohn (instructed by Pinsent Masons LLP) for the **Claimant**
James Strachan KC (instructed by The Financial Ombudsman Service Ltd) for the **Defendant**

Hearing dates: 5 and 6 March 2024
- -

Approved Judgment

This judgment was handed down remotely at 10.00am on Friday 19th April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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His Honour Judge Siddique sitting as a Deputy High Court Judge:

Introduction

1. This case concerns the challenge to the lawfulness of three related decisions of the defendant, the Financial Ombudsman Service, following service complaints submitted by the claimant iDealing.com Ltd, a securities brokerage, via their solicitors Pinsent Masons LLP, on 18 January and 11 July 2022. The majority of the complaints were upheld leading to the decisions under challenge offering compensation of £500, later increased to £750.

2. The complaints related to the defendant's poor handling of an earlier consumer complaint against the claimant and another, namely Suffolk Life Pensions Ltd (the 'consumer complaint'). Amongst other things the claimant complained that the defendant "wrongly threatened" to bring a complaint against the claimant on behalf of the consumer, Mr Henrick, encouraged Mr Henrick to make such a complaint and "doggedly and unreasonably" maintained that the defendant had jurisdiction to deal with the complaint (the 'service complaint'). By way of redress, the claimant requested payment of their legal costs in the sum of £74,864.52 plus VAT. That request was refused leading to the claimant's pre-action protocol letter on 10 November 2022, with the claim for judicial review issued on 5 December 2022.

3. Following the order of Lang J on 3 November 2023, a rolled up hearing was held over two days on 5 and 6 March 2024, when the issue of amenability to judicial review also fell to be determined.

The decisions under challenge

4. The defendant's impugned decisions are as follows:

   (1) the decision of the Ombudsman Manager, Mr Gary Lane, dated 19 August 2022, which offered the claimant compensation of £500 "for any inconvenience" (but which did not offer compensation in respect of legal fees) ("decision 1");

   (2) the decision of the Independent Assessor ("IA"), Dame Gillian Guy, dated 6 October 2022 recommending that the defendant pay £750 where its level of service had fallen "well below a reasonable level" for "the amount of unnecessary effort…needed to expend with the Service" ("decision 2"); and

   (3) the decision of Ms Abby Thomas, Chief Ombudsman, dated 23 December 2022, accepting the IA's recommendation without apparently considering whether it was correct ("decision 3").

5. Decision 3 was originally particularised as the decision of Mr Charlie Sweeney, Lead Ombudsman and Director of Casework, dated 17 October 2022, which had "noted" the IA's recommendation. However, following the service of Ms Abby Thomas' email on 8 December 2023, the claimant no longer seeks to challenge the acceptance of the IA's recommendation based on Mr Sweeney's involvement. Instead, the claimant now seeks to challenge the acceptance of the IA's recommendation on the basis of Ms Thomas' email of 23 December 2022. No objection was taken by Mr Strachan KC for the defendant. I am satisfied that it is possible to fairly deal with the challenge to this later decision and therefore grant leave to amend as necessary.

6. Mr Strachan KC did object to the introduction of two new lines of argument. First, in respect of whether the claimant's legal costs should have been paid as compensation for "distress or inconvenience" (and not just "damage"), in accordance with the

defendant's non-statutory service complaint scheme. Second, whether there was procedural unfairness from an apparent failure to take account of the defendant's guidance on its non-statutory service complaint scheme and from relevant material having been withheld.

7. In *R (Dolan) v Secretary of State for Health and Social Care* [2020] EWCA Civ 1605; [2021] 1 WLR 2326, Lord Burnett CJ re-emphasised the need for procedural rigor in proceedings for judicial review where arguments have not been pleaded. In respect of whether the claimant's legal costs should have been paid as compensation for "distress or inconvenience", ultimately the claimant did not pursue this new line of argument. In respect of the procedural unfairness arguments, as the claimant did not seek leave to amend, I am not required to consider the matter further.

The grounds for judicial review

8. The claimant submits that the decisions are unlawful on the following five grounds:

   (1) Decision 1 involved the application of unpublished guidance.

   (2) Decisions 2 and 3 failed to apply the IA's Terms of Reference.

   (3) Decisions 2 and 3 involved a fetter of the exercise of discretion.

   (4) Decisions 2 and 3 were procedurally unfair.

   (5) The decisions were Wednesbury unreasonable.

Amenability to judicial review

9. By way of a preliminary matter the issue of amenability to judicial review must first be determined. It was common ground between the parties that the correct legal test to the question of amenability was summarised by Dyson LJ in *R (Beer) v Hampshire Farmers' Market Ltd* [2003] EWCA Civ 1056; [2004] 1 WLR 233 at [16], as approved by the CA in *R (Holmcroft Properties Ltd) v KPMG LLP* [2018] EWCA Civ 2093; [2020] Bus LR 203 at [47]:

> "…the law has now been developed to the point where, unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging. But it provides the framework for the investigation that has to be conducted."

10. The conflict between parties was over whether the "nature of the power and function" exercised in the three challenged decisions had "sufficient public element, flavour or character" to bring them within the purview of public law.

Summary of the claimant's submissions

11. The claimant submits that the defendant is established by statute to determine complaints by consumers against firms authorised by the FCA.. It is therefore a public body exercising public law functions meaning it is generally amenable to judicial review. However, at the outset it is important to recognise that the three challenged decisions offering compensation were not exercised under any statutory power and the compensation offered were ex gratia payments. The claimant submits this does not matter for two reasons. First, the claimant submits ex gratia payment schemes are or can nevertheless be reviewable on familiar judicial review grounds, relying upon *R (Mullen) v Secretary of State of the Home Department* [2004] UKHL 18; [2005] 1 AC 1 and specifically *R (Moore) v Skipton Fund Ltd* [2010] EWHC 3070 (Admin); [2010] 12 WLUK 5 at [30]:

> "Mr Singh accepted that the starting point was that there was nonetheless no legal obligation at all to make payment, and any such payments do not represent compensation for losses for which the SSH is legally liable. He also recognised that such cases concern the allocation of public resources, and the courts will be cautious before intervening. However, such schemes and their application are reviewable on familiar judicial review grounds…"

12. Second, the claimant submits that the three challenged decisions have sufficient public element, flavour or character to fall within the purview of public law because they related to a complaint (the service complaint) about the exercise of the defendant's statutory functions (the consumer complaint). As the consumer complaint was subject to a statutory scheme, it follows, says the claimant, that the service complaint relating to it is afforded sufficient public element, flavour or character to bring it within the purview of public law. In short, the non-statutory service complaint is said to fall within the purview of public law because of its nexus with the earlier statutory consumer complaint.

Summary of the defendant's submissions

13. The defendant accepts that it is amenable to judicial review in respect of the statutory discharge of its public law functions under the Financial Services and Markets Act 2000 ("FSMA"). However, it submits that this does not cover its ex gratia voluntary non-statutory service complaint scheme, which does not deal with the substantive complaints under the FSMA. Rather, as the name suggests, the service complaint scheme deals with service issues relating to how the defendant's public law functions were carried out when deciding the substantive complaints under the FSMA. Hence, the IA's Terms of Reference provides that the scope of any review is to "consider complaints about the standard of service and practical handling of a case provided by the Financial Ombudsman Service but not about its outcome, the merits of the complaint, or its commercial and legal obligations."

The non-statutory service complaint scheme

14. It is common ground that the defendant's non-statutory service complaint scheme involves a three-stage process:

> (1) a complaint is initially made and determined by an Ombudsman Manager;

(2) if dissatisfied with this decision, the complainant may refer the matter for a formal review by the IA (who may decide to make a recommendation to the defendant's Chief Executive and Chief Ombudsman);

(3) if a recommendation is made, the Chief Executive and Chief Ombudsman will decide whether to accept the recommendation.

The statutory consumer complaint scheme

15. Given that the claimant additionally submits that the non-statutory service complaint falls within the purview of public law because of its nexus with the earlier statutory consumer complaint, it is necessary to consider the statutory framework for consumer complaints under the FSMA. At this stage, it suffices to say that the defendant is established under section 225 of the FSMA to resolve disputes "quickly and with minimum formality by an independent person." By virtue of section 226, the defendant only has jurisdiction over a consumer complaint if a number of criteria are satisfied, including whether the complainant is an "eligible" complainant. If a complaint meets the jurisdictional requirements, it must be determined under section 228. Section 229 provides for a power to make "a money award" against the respondent of a consumer complaint, such as the claimant. In respect of the claimant, this was subject to a monetary limit of £375,000.

16. In its dealings with the defendant, the claimant repeatedly maintained that Mr Henrick, who made the original consumer complaint, was not an eligible complainant. Notwithstanding this, under section 230 and the subordinate 'Dispute resolution: Complaints' rules' (DISP), a respondent firm does not have any costs entitlement to recover legal fees in dealing with such complaints. Whilst a respondent firm is at liberty to instruct lawyers if it chooses in responding to such complaints, it is not required to do so and it would not be entitled to recover its costs of doing so. DISP 3.7.1.R provides:

> "Where a complaint is determined in favour of the complainant, the Ombudsman's determination may include one or more of the following
>
> (1) a money award against the respondent; or
>
> (2) an interest award against the respondent; or
>
> (3) a costs award against the respondent; or
>
> (4) a direction to the respondent."

17. There is no provision for an award of a respondent's costs. Further, paragraph 10 of Schedule 17 of FSMA sets out a fundamental statutory immunity for the defendant in the performance of its statutory functions under the compulsory jurisdiction, save for bad faith or an unlawful breach of a human right (neither of which is engaged here):

> "(1) No person is to be liable in damages for anything done or omitted in the discharged or purported discharge of any functions under this Act in relation to the compulsory jurisdiction.
>
> (2) Sub-paragraph (1) does not apply-
>
> (a) if the act or omission is shown to have been in bad faith; or

> (b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998."

Findings

18. I am not persuaded that either *R (Mullen) v Secretary of State of the Home Department* or *R (Moore) v Skipton Fund Ltd* assist the claimant. *R (Mullen) v Secretary of State of the Home Department* concerned payment of ex-gratia compensation payments by the Home Secretary where there had been a miscarriage of justice or a wrongful conviction. Moreover, the issue of amenability did not arise there. *R (Moore) v Skipton Fund Ltd* was a case that challenged the lawfulness of an ex gratia compensation scheme established by the Secretary of State for Health to compensate those who received blood or blood products that were contaminated, in particular, with Hepatitis C, when undergoing treatment by the NHS. Three examples provided therein at [30] of schemes found to be susceptible to judicial review were as follows:

> "(1) Material error of fact infected the decision to reject an independent inquiry's recommendation that ex gratia payments to NHS patients treated with contaminated blood should match the higher level of compensatory payments made by the Irish government: *R (March) v Secretary of State for Health* [2010] EWHC 765 (Admin).
>
> (2) Eligibility criteria based on the country of birth and imposed by the Secretary of State for Defence on an ex gratia compensation scheme for British civilians who were prisoners of the Japanese during the Second World War were quashed on the basis that they constituted indirect racial discrimination under the Race Relations Act 1976: *Secretary of State for Defence v Elias* [2006] EWCA Civ 1293; [2006] 1 WLR 3213.
>
> (3) The decision by the Home Secretary to exclude judicial misconduct from deciding whether it could constitute exceptional circumstances within his statement on 29 November 1985 for ex gratia payments to persons who had wrongfully been detained in custody as a result of wrongful conviction constituted an unlawful fettering of discretion: *R v Home Secretary, ex parte Garner* (Divisional Court, 19 April 1999)".

19. Thus the cases relied upon by the claimant as support for the amenability of judicial review of ex gratia payment schemes concerned Government introduced prerogative compensation schemes. Such schemes were considered in *R (Sidhpura) v Post Office* [2021] EWHC 866 (Admin), where Holgate J said at [30]:

> "At para.48 of his skeleton Mr Coppel QC says that this claim for judicial review is not concerned with enforcing private law rights. Instead, it is concerned with the nature of an ex gratia compensation scheme created by the defendant exercising a common law power. At that point in his argument, he relied upon a number of authorities which undoubtedly show that in some circumstances an ex gratia compensation scheme is amenable to judicial review. But I do not accept that they support the approach which Mr Coppel seeks to take. This is simply because those cases, and there is now no dispute about this, are all examples where it is plain that both the decision-maker was discharging a public or governmental function and,

> moreover, the source of the power was either legislation or the royal prerogative. As I have said, even if the court were to accept, for the sake of argument, that the Post Office is, at least for some purposes, a public authority, that would not, in itself, be sufficient to render the Scheme amenable to judicial review. For example, there can be no doubt that a local authority is a public body amenable to judicial review of its functions. But disputes involving a local authority which only relate to private law issues are not amenable to judicial review, for example, claims based on negligence, contract or property law, not unless a public law element has been injected into the dispute. For example, decisions on letting contracts which are the subject of the procurement code, a statutory regime, are amenable to judicial review."

20. Such prerogative schemes are in stark contrast with the nature and function of the compensation scheme operated by the defendant in the instant case, namely a voluntary non-statutory scheme designed to improve its service, following the exercise of what might properly be described as quasi-judicial (and at least not governmental) statutory functions when deciding upon consumer complaints under the FSMA. In those circumstances, in my judgment the claimant is not assisted by the authorities relied upon. Indeed, as confirmed in *R (The Liberal Democrats & the Scottish National Party) v ITV* [2019] EWHC 3282 (Admin); | [2020] 4 WLR 4 at [70], "Functions of a public character are essentially functions which are governmental in nature."

21. Statutory immunity is commonplace in relation to the exercise of judicial or quasi-judicial functions. It is a logical legislative objective that those who perform such roles should not be subject to satellite litigation regarding acts or omissions, absent some issue of bad faith or a breach of a human right. Whilst the claimant submits that this is not a claim for damages, and so paragraph 10, Schedule 17 of FSMA is not relevant, by that logic none of the legislative framework is applicable to the non-statutory decisions under challenge, which undermines the claimant's case that those decisions fall within the purview of public law because of their nexus with the statutory service complaint.

22. The correct legal test summarised by Dyson LJ in *Beer* "requires a careful consideration of the nature of the power and function that has been exercised." As a matter of logic it does not follow that the nature of the power and function of the decisions relating to the non-statutory service complaint changes because of its nexus with the earlier statutory consumer complaint. I am not therefore persuaded that the nature of the power and function exercised in the three challenged decisions have sufficient public element, flavour or character to bring them within the purview of public law simply because they relate to the earlier statutory consumer complaint.

23. If my reasoning is incorrect and the statutory consumer complaint's framework is determinative to whether the non-statutory service complaint scheme falls within the purview of public law, in my judgment it is unjust for the claimant to receive the benefit of that statutory framework without its burden, namely the statutory enshrined prohibition to recover damages relating to compulsory jurisdiction when responding to such a complaint (and the absence of provision for a respondent's costs in DISP 3.7.1.R). In those circumstances, I would refuse permission under section 31(3D) of the Senior Courts Act 1981 on the basis that it is highly likely the outcome would not have been substantially different if the conduct complained of had not occurred. As was stated by Davis and Warby LJJ in *R (The Liberal Democrats & the Scottish National Party) v ITV* at [86], even where "aggrieved persons thus may have no direct private law remedy…it

does not follow at all that that must mean that aggrieved persons must have a direct public law remedy..."

Conclusion on amenability to judicial review

24. For the above reasons I conclude that the nature of the power and function exercised in the decisions under challenge do not have sufficient public element, flavour or character to bring them within the purview of public law. I find that the claimant's voluntary non-statutory service complaint scheme, and the three decisions under challenge, are not amenable to judicial review.

Ground 1: decision 1 involved the application of unpublished guidance

25. Under ground 1, the claimant contends that the decision of the Ombudsman Manager, Mr Gary Lane, dated 19 August 2022, which offered the claimant compensation of £500 "for any inconvenience", involved the application of unpublished guidance. I do not find this ground to be academic as maintained by the defendant. Whilst decisions 2 and 3, and the offer of £750 compensation, effectively supersede decision 1 (the offer of £500), it is possible as a matter of law that decisions 2 and 3 could be quashed whilst decision 1 is untouched. In those circumstances, the defendant may choose to recommence stages 2 and 3 of its service complaint scheme. However, given that the scheme is voluntary and considered by the claimant to be non-amenable to judicial review, that is not necessarily a given.

26. The unpublished policy which the claimant points to is a document titled, "Service complaints – what to do (managers and senior managers)", at page C209 of the core bundle. By way of authority, the claimant relies upon paragraph 48.1.12 of the Judicial Review Handbook (7th edn), which in turn cites Lewis J in *R (Lupepe) v SSHD* [2017] EWHC 2690 (Admin); 10 WLUK 688:

> "material parts of the policy guidance applied by the defendant's official in reviewing the curfew imposed in the claimant's case were not published... At least those parts of the instructions containing the policy guidance dealing with the criteria for the application, and duration, of curfews should, as a matter of public law, have been published. Further, in my judgment, the application of an unpublished policy setting out criteria relevant to the exercise of executive power in the claimant's case rendered the decision unlawful"; *R (McMorn) v Natural England* [2015] EWHC 3297 (Admin) [2016] PTSR 750 at §159 ("unlawful" to reach a decision "on the basis of [an] undisclosed policy")."

27. Mr Strachan KC for the defendant submits that the document is a guidance document for staff rather than a policy document. In *R (Overton) v Secretary of State for Justice* [2023] EWHC 3071 (Admin); [2023] 12 WLUK 65, Eyre J stated at [51]:

> "The purpose of the formulation of a set of criteria governing the way in which a discretion will be exercised is to ensure that the discretion is not exercised arbitrarily or otherwise unlawfully."

Whilst Mr Strachan KC is correct that the document does not stipulate any criteria for compensation payments, the document does provide the following guidance at page 2 (core bundle page C210):

> "Usually an explanation or apology can sort things out. But if we've done something wrong, it's very important to think about the impact of what we've done on the person complaining. And remember that if a consumer complains about our service, they still have a complaint against the financial business at the heart of it. So think carefully about whether we've really caused a problem or made an existing one worse – and try to get things back on track.
>
> If you're thinking of making a payment for any poor service we've given, take into account the above and the impact of what we've done, and use as a guide the awards we make against financial businesses for distress or inconvenience caused. Bear in mind that we mind consider compensation differently in complaints brought to us by businesses as is explained here.
>
> If you do think we should make a payment, you'll need it to be agreed by a senior manager. See the table below for the level of sign-off needed (depending on the amount) and any other colleagues to consult and/or inform."

28. The table referred to in the above passage appears at page 3 of the document. It requires managers to consider the "impact" of the poor service. Further, it envisages the possibility of payments in excess of £10,000, but only details who must sign-off such a payment without stipulating any eligibility criteria for payments. Mr Lane says nothing in his statement dated 8 December 2023 that indicates he was aware of the possibility of compensation payments being upwards of £10,000. Indeed, it is clear from his statement that Mr Lane was unaware of, and therefore did not rely upon, this document. At paragraph 2.5, Mr Lane states:

> "In my role as Ombudsman Manager considering a service complaint, I consider them on a case by case basis on what I consider a fair outcome if I identify a service failing. At the time of iDealing's service complaint, we had Senior Advisors allocated to each casework "pod" (which was a collection of teams). Part of the Senior Advisor's role was to provide advice and guidance in relation to the service complaint process. The aim of this process was to ensure that there were checks and balances with some level of consistency and fairness around how different casework pods responded to service complaints. I am not aware of any guidance or policy which the Senior Advisors followed, other than their own experience. Generally speaking, the Independent Assessor's findings get fed back to the FOS' employees so that we can learn from them."

29. Therefore, I do not find it to be arguable that Mr Lane's decision involved the application of unpublished policy. The fact that he had a discussion with a Senior Advisor about the service complaint does not undermine this. However, it is clear that the document in question is a guidance document for managers and senior managers, which Mr Lane should have been aware of and taken into account. Notwithstanding this, I am satisfied that it is highly likely the outcome would not have been substantially different even if Mr Lane had been aware of the guidance document. First, in his emailed decision of 19 August 2022 (decision 1), Mr Lane demonstrates that he took into account the "inconvenience" and "frustration" (and therefore the "impact") caused to the claimant from the poor handling of the consumer complaint:

> "Having looked at the history of this case, I agree that there were failings on the part of our service in how it was handled. I agree that initial errors were made in

> the way that our first investigator approached setting up the complaint against Idealing. I've explained that he ought to have been clearer in establishing that Mr Henrick wanted us to consider a complaint against Idealing before suggesting that might be the case. And the basis for the complaint ought to have been made clearer to Idealing from the beginning.
>
> I agree that there were failures to share information that may have helped Idealing to respond to the specific complaint points more easily. The case was reassigned from Mr Malcolm to Claire when Mr Malcolm left our service. And I don't think Claire progressed the investigation in a timely fashion. There was a long period of inactivity with no update to either Idealing or Mr Henrick. I apologise for the confusion this may have caused. And for the inconvenience that may have been caused by Claire corresponding directly with Idealing rather than Pinsent Mason, as requested.
>
> I understand that this case has subsequently been resolved by an ombudsman decision, that it is not in fact in our jurisdiction. I can certainly understand the frustration that will have been caused to both parties because of the time that it took to reach this conclusion. And the confusion at our service giving an answer that we later changed. I apologise for these frustrations. Whilst the original investigator that set this case up for Mr Henrick has left our organisation, I will ensure that the identified failings are fed back appropriately where failings have been identified.
>
> I also apologise for our failure to address these issues when they were originally brought to our attention. I hope that my findings now address the concerns raised. By way of apology for the inconvenience that our service failings have caused Idealing, I'd like to offer a compensation payment of £500. If Idealing wish to accept our offer of compensation, can it provide me with bank account details to arrange payment."

30. Second, for reasons I have already detailed above, the claimant would never be entitled to recover its costs, or damages relating to compulsory jurisdiction, when responding to a statutory consumer complaint. In those circumstances, it is unrealistic to expect that the defendant's voluntary non-statutory complaint scheme would provide compensation to cover such legal costs. I address this in greater detail below, under ground 2, where I reject the claimant's submission that the IA's Terms of Reference provided for a discretion to pay for legal costs. Consequently, I would refuse permission under section 31(3D) of the Senior Courts Act 1981 on the basis that the outcome would not have been substantially different if the conduct complained of had not occurred.

The email from the Adjudicator, Mr James Malcolm, dated 3 October 2019

31. The fact that the claimant contends that they received a threatening email from the defendant that led to their instruction of solicitors and consequential legal costs does not change this position. The email in question was from the Adjudicator, Mr James Malcolm, dated 3 October 2019, in the following terms:

> "Dear idealing.com,
>
> That is correct. Mr Henrick authorised this service, via a verbal declaration, to investigate his complaint as appropriate, including contacting other financial organisations involved in the issue for information.
>
> Could you provide a name and direct telephone number for the contact at dealing.com dealing with this, please?
>
> If idealing.com doesn't provide a contact and suitable number, and doesn't respond to the request about the email it sent to Mr Henrick, we will open a complaint about this matter on Mr Henrick's behalf against idealing.com, which will be chargeable.
>
> Thank you."

32. This email was sent just six days after the date of the first communication between the claimant and defendant on 27 September 2019. The claimant contends that the email was threatening and led to their instruction of solicitors, who began correspondence with the defendant on 4 October 2019, the day after Mr Malcolm's email. Whilst the defendant concedes that Mr Malcolm should not have expressed himself in the way that he did, there is no dispute between the parties that the legislative framework, and subordinate DISP, entitled Mr Malcolm to request a contact name and direct telephone number from the defendant. Indeed, DISP 1.3.8.G states:

> "Firms are not required to notify the name of the individual to the FCA or the Financial Ombudsman Service but would be expected to do so promptly on request. There is no bar on a firm appointing different individuals to have the responsibility at different times where this is to accommodate part-time or flexible working."

33. In respect of a complaint being "chargeable", the claimant's own Statement of Facts and Grounds, at footnote 9, provides:

> "A case becomes "chargeable" if it needs to be investigated by the FOS. A case fee of £750 must be paid if four or more complaints have been made against the firm in the financial year: https://www.financial-ombudsman.org.uk/businesses/resolving-complaint/case-fees."

There can therefore be no issue with the use of the word "chargeable." However, it was at the very least clumsy of Mr Malcolm to say that he would open a complaint on behalf of Mr Henrick (who made the original consumer complaint) against the claimant if a contact and suitable number was not provided. DISP 3.5.2.G merely states:

> "The Ombudsman may inform the complainant that it might be appropriate to complain against some other respondent."

Indeed, this was later conceded by Mr Malcolm in his letter to Mr Henrick dated 10 December 2019:

> "The Financial Ombudsman Service may inform a complainant that it might be appropriate to open a complaint against another business – but we cannot require a complainant to so, and we cannot open such a complaint of our own volition."

The history of Mr Henrick's complaint leading to the defendant's involvement

34. Whilst Mr Malcolm's email was inelegant, his email was sent in the knowledge that Mr Henrick had originally submitted a complaint to the claimant (on 4 April 2017). Further, in an email to Mr Malcolm dated 18 April 2019, Mr Henrick stated:

> "I confirm I am not withdrawing my complaint against Suffolk Life but adding Idealing.com into the complaint."

35. Consequently, with that factual background, I am not satisfied that this was a "threat [that] was unfair and unreasonable, an abuse of the FOS's position and an exercise in high-handedness", as asserted in the skeleton argument for the claimant (page 7, footnote 8). My assessment is unaffected by Mr Malcolm's 16 January 2019 suggestion to Mr Henrick to bring a complaint against the defendant. That suggestion was consistent with DISP 3.5.2.G. Further, it was only made after Mr Henrick had already called the defendant on 25 July 2018 to complain about Suffolk Life Pensions Ltd.

36. On 20 October 2019, Mr Henrick completed a complaint form against the claimant, although in his accompanying comments focused his complaint against Suffolk Life Pensions Ltd. On 10 December 2019, Mr Malcolm replied as follows:

> "Having considered your stated position carefully, my view is that it's clear your complaint must be directed solely against Suffolk Life – and assessed as such. My view is that you have not brought, and do not wish to bring, a complaint against iDealing.com, as you do not feel that iDealing.com has a complaint to answer in what took place."

This evidence tends to undermine the claimant's assertion that the defendant "doggedly, and without reason, pursued an entirely meritless complaint against the claimant." Moreover, at this stage Mr Henrick did not accept this finding, requesting on 10 January 2022 an "appeal" against Mr Malcolm's 10 December 2019 letter, adding:

> "Please issue your response against my complaint against idealing.com as sent to you in October 2019."

In those circumstances, it was perfectly reasonable for the defendant to continue to assess a complaint, or potential complaint, against the claimant.

Correspondence over jurisdiction

37. More than a year later, on 8 February 2021, a different Adjudicator, Claire Poyntz, wrote to the claimant to state that she considered Mr Henrick to be an eligible complainant. She ended her email explaining that if this was not agreed then an "ombudsman here can look at everything again and make a decision." Following further correspondence, including a letter from the claimant's solicitors dated 2 December 2021 repeating earlier requests for "a copy of the documents upon which this complaint is apparently based", on 18 January 2022, the claimant submitted its first of two service complaints (the second was sent to the IA on 11 July 2022). Between 8 October 2019 and 21 March 2022, the claimant made a total of eight similar disclosure requests.

38. On 20 January 2022, the Ombudsman, Roy Kuku, decided that the defendant had jurisdiction to deal with Mr Henrick's complaint. Detailed reasons were provided. The claimant's solicitors responded on 22 March 2022 with a pre-action protocol letter, leading the defendant to agree on 1 April 2022 to re-consider the issue, whilst citing Ouseley J in *Chancery (UK) LLP) v Financial Ombudsman Service Ltd* [2015] EWHC 407 (Admin); | [2015] 2 WLUK 689 at [75]:

> "However, although it is for the FOS to consider jurisdiction at the outset, if it decides that it has jurisdiction where that is contested, it may need to keep the question of jurisdiction open throughout the course of the decision-making process. The issue may not be closed by the final jurisdiction decision. New evidence and issues will have to be considered….[w]here jurisdiction has been and continues to be disputed, the FOS must consider any evidence and argument which goes to his jurisdiction, until the conclusion of the case…"

39. Further correspondence followed including assurances given by the defendant not to take issue over time limits for commencing judicial review proceedings (strictly speaking this is a matter for the Court although such an agreement may be relevant to the exercise of discretion; CPR 54.5(2) and *R (Zahid) v The University Of Manchester* [2017] EWHC 188 (Admin); 2018] P.T.S.R. 1728 at [73]-[78]). On 25 May 2022, the Ombudsman Manager, Mr Tim Wilkes, provided further detailed reasoning in light of the submissions from the claimant's solicitors, concluding that Mr Henrick was not in fact an eligible complainant (and therefore the defendant did not have jurisdiction). A similar email was sent to Mr Henrick, who accepted the conclusions in an email reply on 10 June 2022. Thus, on the issue of jurisdiction of Mr Henrick's complaint against the claimant, ultimately the defendant decided in favour of the claimant, although this took more than two and half years from the date of when Mr Henrick completed his complaint form (on 20 October 2019).

40. On 19 August 2022 (the date of decision 1), the Ombudsman Manager, Mr Lane, responded to the 18 January 2022 service complaint (having earlier explained that it had been misunderstood that the correspondence regarding judicial review proceedings had superseded the complaint). He concluded that Mr Malcolm ought to have been clearer in establishing that Mr Henrick wanted to complain before suggesting that might be the case; that the basis for the complaint ought to have been made clearer to the claimant; that there were failures to share information; the investigation was not timely; and it was an error to send correspondence direct to the claimant rather than to their solicitors as had been requested. By way of apology for the inconvenience caused, Mr Lane offered £500 compensation. In the service complaint letter to the IA dated 11 July 2022, the claimant's solicitors requested payment of £74,864.52 plus VAT (consisting of £22,048.41 plus VAT for the period to the first complaint letter dated 18 January 2022 and £52,816.12 plus VAT from that date to the date when jurisdiction was decided in favour of the claimant, namely 25 May 2022).

Claimant's decision to instruct solicitors

41. At paragraph 7 of his statement dated 22 December 2023, the claimant's Chief Executive officer, Mr Lee Foster Bowman, explains the reason for their swift instruction of solicitors, as early as 4 October 2019, upon receipt of Mr Malcolm's 3 October 2019 email:

> "It is clear to me that had I not instructed lawyers, Pinsent Masons LLP, in this case, the FOS would have continued with its misconceived approach that it did have jurisdiction over Mr Henrick's complaint. It is also of note that even when I did instruct lawyers, the FOS did not suddenly change its approach. It continued to ignore requests from my lawyers to, for example, see a copy of the complaint against Suffolk Life. Given how evasive and difficult the FOS was with regard to communications from my lawyers, it is obvious that they would have been even more obstructive had I acted in person."

42. However, the claimant's early decision to instruct solicitors to deal with the consumer complaint was entirely their choice. As a matter of law, such a decision has no bearing on the statutory bar on damages relating to the issue of compulsory jurisdiction and the absence of provision for a respondent's costs under DISP 3.7.1.R. Moreover, given the content of Mr Bowman's statement, it appears that the decision to instruct solicitors was motivated by the claimant's experience with the defendant from a previous unrelated consumer complaint. Mr Bowman's statement reads:

> "10. Unfortunately, this is not the first time that the Claimant has had to issue Judicial Review proceedings because incorrect decisions were made by the Defendant. In 2015 a Mr Kimcheng Kith made a complaint to the Defendant that the Claimant had caused his account to be frozen. The complaint was referred to an adjudicator, who made two preliminary decisions on 20 October 2017 and 19 February 2018, both of which were challenged by the Claimant.
>
> 11. On 19 June 2018 the Defendant issued a decision which upheld the complaint. On 3 August 2018, Pinsent Masons sent a Judicial Review Pre-Action Protocol letter on behalf of the Claimant to the Defendant setting out the reasons for disagreeing with the decision and why the decision was irritational and why it should be quashed. On 19 September 2018 the Claimant commenced judicial review proceedings.
>
> 12. Following further correspondence, the matter was settled by consent. Having read the documents filed at Court by the Defendant and Pinsent Masons LLP, on 18 September 2019, Sir Wyn Williams in his position as a High Court judge made an order that amongst other things, the Defendant's decision dated 19 June 2018 was quashed and that the Defendant should pay the Claimant's costs up to and including 31 January 2019 and the costs of preparing the Claimant's written submission on the issue of costs and that the costs should be taxed on a standard basis if not agreed. A copy of the order is at pages 1 to 4."

43. A copy of the order made by Sir Wyn Williams dated 19 June 2018 is included in the supplementary bundle. The relevant section of the order provides:

> "3. The Defendant shall pay to the Claimant the costs of and incidental to the claim incurred up to and including the 31 January 2019 and the costs of preparing the Claimant's written submissions on the issue of costs. Otherwise there shall be no order for costs."

There are two fundamental differences between the previous scenario leading to the order of Sir Wyn Williams and the instant case. First, that previous scenario involved the challenge by judicial review proceedings of the defendant's decisions about a consumer

complaint; whereas in the instant case the claimant seeks to challenge the defendant's decisions about their (the claimant's) service complaint. Second, the order did not require the defendant to "pay the Claimant's costs up to and including 31 January 2019" (as stated by Mr Bowman), but rather to pay the "costs of and incidental to the claim"; as in the claim for judicial review. That is not an order to pay the costs of instructing solicitors to deal with or challenge a consumer complaint made under the statutory complaint scheme, let alone a service complaint made under the non-statutory complaint scheme.

Conclusion on ground 1 (decision 1 involved the application of unpublished guidance)

44. For the above reasons, I am not persuaded that it is arguable that Mr Lane's decision (decision 1) involved the application of unpublished policy. Consequently, even if the decision was amenable to judicial review, I would still refuse permission on this first ground. Moreover, I am satisfied that it is highly likely the outcome would not have been substantially different even if Mr Lane had been aware of the guidance document, meaning I would also refuse permission under section 31(3D) of the Senior Courts Act 1981. The legal costs incurred by the claimant following its early instruction of solicitors were always unrecoverable and remain so.

Ground 2: decisions 2 and 3 failed to apply the Terms of Reference

45. In respect of decision 2, the claimant contends that the IA was employed by the defendant meaning they were not "independent from the Chief Executive and Chief Ombudsman", as required by the Terms of Reference (ToR) for the appointment. They also point to the IA's own description of her appointment which states: "I am impartial. This means that I am independent of the service and form my own view without influence."

46. I am not persuaded that the IA's ToR arguably require that they must not be an employee of the defendant. The complete passage that is relied upon by the claimant reads:

> "1. The Independent Assessor is appointed by and accountable to the Board of the Financial Ombudsman Service and is independent from the Chief Executive and Chief Ombudsman."

Thus the independence that is required is from the Chief Executive and Chief Ombudsman rather than from the defendant's Board. There is no requirement that the IA must not be employed by the Board. If anything, given the absence of a requirement to be independent from the Board the implication is that the IA may be employed by the Board.

47. In respect of decision 3, the claimant contends that the IA misconstrued the ToR when making her recommendation dated 6 October 2022 by first, failing to consider the impact of the defendant's errors upon the claimant and second, by failing to consider that she had a discretion to pay for legal costs under ToR 12, which reads:

> "If the Independent Assessor decides that the Financial Ombudsman Service hasn't met its service standards, a recommendation may be made in the Review to the Chief Executive and Chief Ombudsman. This might be that the Financial Ombudsman Service should apologise and/or pay compensation for any damage, distress or inconvenience caused by the poor service."

48. Dealing first with compensation for legal costs, the claimant submits that the ToR must cater for the possibility of recommending a payment to reimburse such costs which have been unnecessarily incurred by the defendant's poor service given use of the word "damage", relying upon chapter 21 of McGregor on Damages (21st edition) and *Playboy Club London Ltd v Banca Nazionale Del Lavora Spa* [2019] EWHC 303 (Comm); [2019] 2 WLUK 290 at [27]-[42].

49. Whilst the principle that damages can encompass legal costs is uncontroversial, by way of observation I do note that this ground is inconsistent with the claimant's position that it was not seeking damages (given the statutory prohibition provided by paragraph 10, Schedule 17 of the FSMA). In any event, the ToR only refers to compensation for any "damage, distress or inconvenience caused by the poor service." There is no mention of "damages." An interpretation that "damage" actually means "damages, including legal costs" is inconsistent with the plain reading of the ToR. It is also inconsistent with paragraph 2 of the ToR that states that the non-statutory complaint scheme is concerned with "the standard of service and practical handling of a case" and not with the "outcome, the merits of the complaint, or its commercial and legal obligations." Paragraph 6 of the ToR further clarifies that this includes "whether a complaint is within the Financial Ombudsman Service's jurisdiction." Thus if the outcome or merits of a consumer complaint fall outside the service complaint scheme, it is unlikely that compensation for the legal costs of dealing with the outcome or merit of a consumer complaint fall within the service complaint scheme.

50. Notwithstanding the limitation on the parameters of a service complaint, the claimant's service complaint related to both how the defendant dealt with Mr Henrick's original consumer complaint and the merits of the jurisdiction issue. The claimant's complaint letter from its solicitors to the IA dated 11 July 2022 stated at paragraph 8.1.4, that the defendant:

> "…doggedly and unreasonably maintained that it did have jurisdiction for an extended period of time even though it was clearly wrong, only to capitulate under the threat of a judicial review, whereupon the arguments that iDealing had been making for some time about the FOS not having jurisdiction were accepted without challenge."

However, arguments and submissions that went to the merits of the complaint were matters for the statutory complaint scheme and not for the IA and/or the service complaint scheme. Given that under the statutory framework and DISP 3.7.1.R a respondent of a consumer complaint is not entitled to damages (relating to the issue of compulsory jurisdiction) or legal costs when dealing with a consumer complaint, it is difficult to see how such a respondent could be entitled to damages or legal costs under the non-statutory scheme which is intended to exclude consideration of the merits of a consumer complaint altogether.

51. I recognise however that it might be said that there is a statutory bar on the recovery of damages relating to the compulsory jurisdiction process, yet "damage", including damage to property, in principle is recoverable under the non-statutory complaint scheme. By that logic it could be argued that legal costs ought to be equally recoverable under the non-statutory complaint scheme, despite the inability to do so under the statutory complaint scheme. However, the difficulty with such an argument is that whilst "damage" is provided for in the ToR, "legal costs" are not. Given that the defendant is

established under section 225 of the FSMA to resolve disputes "quickly and with minimum formality", this is unsurprising.

52. Turning now to whether the IA considered the impact of the defendant's errors upon the claimant; at page 2 of her recommendation letter dated 6 October 2022, the IA stated:

> "The Service has acknowledged that you received a poor level of service. It has apologised and offered £500 compensation. I understand you are claiming for £74,864.52 (the legal cost incurred by IDealing) by way of compensation for the poor handling of this case. However, my recommendations for compensation are purely based on the level of service and not meant as recompense. In light of my review I recommend the Service pays you an additional £250, to total £750, for the amount of unnecessary effort you have needed to expend with the Service."

Conclusion on ground 2 (decisions 2 and 3 failed to apply the Terms of Reference)

53. This ground is unarguable. It is clear from the IA's 6 October 2022 letter that whilst not delving into detail, in broad terms the IA did consider the impact of the "poor service" on the claimant as being the expenditure of "unnecessary effort." There is no requirement that the degree of independence for the IA is such that they must not be employed by the defendant. Further, for the above reasons, I reject the submission that "damage" included compensation for legal costs. Consequently, even if the decisions were amenable to judicial review, I would still refuse permission on this second ground. I would also refuse permission under section 31(3D) of the Senior Courts Act 1981 on the basis that it is highly likely the outcome would not have been substantially different, given my reasons above over why legal costs were never recoverable.

Ground 3: decisions 2 and 3 involved a fetter of the exercise of discretion

54. In respect of ground 2, my findings were first, that the IA did consider the impact of the defendant's errors upon the claimant and second, that the ToR did not provide for damages including legal costs. It follows therefore that there was no fetter of discretion by the IA in recommending compensation of £750 for the unnecessary effort (in other words inconvenience) caused to the claimant by the defendant's poor service.

55. In respect of ground 3, the claimant contends that the defendant fettered its discretion alleging that the Chief Ombudsman, Ms Abby Thomas, effectively rubber stamped the IA's recommendation without considering whether it was correct. By way of authority, the claimant relies upon *R v Secretary of State for the Home Department ex parte Garner* (unreported, 19 April 1999), where Rose LJ said at [28]:

> "In our judgment, despite the submissions of Mr Sales to the contrary, it is plain, from the decision letters and affidavits in each of these cases (save Carter where the point does not arise) viewed separately and together, that the respondent has not given any consideration to whether judicial conduct can be of such quality as to give rise to exceptional circumstances within the second limb of the Statement. The respondent has, it seems to us, invariably proceeded on the basis that a judge is not a public authority within the first limb. That approach is correct as far as it goes. But in failing further to consider in each case whether judicial misconduct was so gross as to give rise to exceptional circumstances, the respondent has improperly fettered the exercise of his discretion. It will, no doubt, be a very rare

> case indeed where judicial misconduct has caused a period to be spent in custody and where the misconduct is of the exceptional nature which the second limb of the Statement requires. It will, as Sir Thomas Bingham MR made plain in *ex p. Bateman & Howse*, be an even rarer case in which the court will interfere with the Secretary of State's evaluative judgment in this respect. But, as it seems to us, such an evaluative judgment should be made by the respondent in each case where judicial misconduct is alleged and relied on by an applicant for compensation."

56. The claimant further relies on the fact that none of the IA's recommendations (some 741 in total) have ever have been rejected by the Chief Executive and Chief Ombudsman in the last five years. Without further detail or analysis it is unknown how many of those cases were recommendations that favoured the complainant and how many favoured the defendant as the respondent of the complaints. Nevertheless, the statistic is a piece of evidence that tends to suggest that the Chief Executive and Chief Ombudsman may not be conducting an evaluative judgment.

57. In response, Mr Strachan KC submits that it would be unusual for a recommendation to be rejected following an independent review. Indeed, the IA's ToR demonstrates that a rejection would have to be justified with reasons:

> "14. If the Chief Executive and Chief Ombudsman doesn't accept a recommendation, they will notify the Independent Assessor who will refer the matter to the Board of the Financial Ombudsman Service. The Board will usually decide on their response at their next meeting.
>
> 15. If the Board decides not to accept a recommendation, they will give their reasons to both the Independent Assessor and the party making the complaint. The reasons will be published in the annual directors' report."

58. However, paragraph 13 of the ToR might be said to give the Chief Executive and Chief Ombudsman an incentive to take the path of least resistance; in other words to accept the IA's recommendation at face value without carrying out an evaluative judgment:

> "13. If the Chief Executive and Chief Ombudsman accepts a recommendation from the Independent Assessor, the Financial Ombudsman Service will write to the party who complained and will notify the Independent Assessor."

In the case of an acceptance, the defendant need only write to the complainant and notify the IA. Whereas if a recommendation is rejected, the Chief Executive and Chief Ombudsman must notify the IA who will refer the matter to the Board for its consideration. A rejection by the Board must be accompanied with reasons to both the IA and complainant, which must also be published in the annual directors' report.

59. In any event, in a brief email dated 23 December 2022 from the Chief Executive and Chief Ombudsman, Ms Abby Thomas, to her Senior Legal Counsel, Rebecca Thomas, Ms Thomas confirmed:

> "I confirm I have read the recommendation from the Independent Assessor dated 6 October 2022 concerning Mr Fenn's complaint which was classified as unsatisfactory with recommendations and I accept that recommendation."

Conclusion on ground 3 (decisions 2 and 3 involved a fetter of the exercise of discretion)

60. Given the 23 December 2022 email and my aforementioned reasons, I am not persuaded that it is arguable that Ms Thomas effectively rubber stamped the IA's recommendation without considering whether it was correct. Further, I find that the IA did consider the impact of the defendant's errors upon the claimant. It follows therefore that there was no fetter of discretion. Given also my finding in respect of ground 2 that the IA's ToR did not provide for damages including legal costs, even if there was a failing, I would refuse permission under section 31(3D) of the Senior Courts Act 1981 on the basis that it is highly likely the outcome would not have been substantially different. Therefore, notwithstanding the issue of amenability, I would still refuse permission on this third ground.

Ground 4: decisions 2 and 3 were procedurally unfair

61. The claimant submits that the defendant's entire decision-making process was procedurally unfair in that it lacked transparency (decision 1), lacked independence (decision 2) and ultimately lacked any objective assessment in the final decision (decision 3). In respect of all three decisions, it is said that no proper reasons, or clear and rational reasons, were provided: in respect of decision 1 for rejecting the request for a payment of legal costs; in respect of decision 2 for the refusal by the IA to exercise her discretion to pay legal costs; and in respect of decision 3 for accepting the IA's recommendation.

62. Additional lines of arguments emerged in the claimant's skeleton argument over whether there was procedural unfairness from an apparent failure to take account of the defendant's guidance on its non-statutory service complaint scheme and from relevant material having been withheld. I have dealt with this at the outset but in short following objection from Mr Strachan KC, leave to amend was not sought and consequently I am not required to consider those matters further.

63. Decision 1 was not specifically mentioned as being challenged under ground 4. However, it was included at paragraph 104 of the claimant's Statement of Facts and Grounds and no issue was taken by Mr Strachan KC. In those circumstances, I am satisfied I can fairly deal with it. I do not find that decision 1 lacked transparency given my finding above that it did not involve the application of unpublished policy. However, it is clear from Mr Lane's emailed decision of 19 August 2022 that no reasons were provided for rejecting the request for payment of legal costs. Indeed, Mr Lane concedes as much within the final three paragraphs of his memo to the IA dated 21 September 2022:

> "In section 9, Pinsent Masons introduce a claim for legal costs incurred by Idealing of £74,864.52 + VAT. As this isn't something that was specifically addressed in the final response, I think it would be useful to comment at this stage. The complaint process that we follow is set out under the DISP rules. DISP 1.1.19 explains that firms are entitled to outsource complaint handling. But it is not a necessary part of the process. And there is no requirement under DISP for our service to meet the costs incurred by a business for its handling of a complaint once it has been brought to our service. A consumer may choose to be represented in bringing a complaint to our service, even though it's not a necessary part of our process. And we do not cover costs incurred by that choice, nor do we direct respondent businesses to meet those costs. In the same way, respondent businesses

> do not need to outsource complaint handling to a solicitor. Idealing elected to do this from the outset, knowing that this would incur costs. But we do not consider it was a necessary or unavoidable consequence of the case being investigated. And it is not a consequence of the failings that I acknowledged in my final response to the service complaint. Therefore, I don't agree that our service is responsible for meeting the costs that Pinsent Masons claim."

64. In respect of decision 1, it is not clear to me that there was any procedural obligation for the defendant to provide reasons for non-payment of legal costs. However, even if this did amount to a procedural failing, as I have already explained I am satisfied that it is highly likely the outcome would not have been substantially different as the legal costs incurred by the claimant following its early instruction of solicitors were always unrecoverable.

65. In respect of decision 2, I have already found under ground 2 that there is no requirement that the IA's independence means that they must not be employed by the defendant. My conclusion under ground 2 also addresses the reasons given by the IA in respect of the compensation she offered, namely for the poor service leading to extra effort expended by the claimant. Unlike Mr Lane's decision of 19 August 2022, the IA's 6 October 2022 recommendation does address legal costs, which she intertwines with her finding of poor service as follows:

> "The Service has acknowledged that you received a poor level of service. It has apologised and offered £500 compensation. I understand you are claiming for £74,864.52 (the legal cost incurred by IDealing) by way of compensation for the poor handling of this case. However, my recommendations for compensation are purely based on the level of service and not meant as recompense. In light of my review I recommend the Service pays you an additional £250, to total £750, for the amount of unnecessary effort you have needed to expend with the Service."

The explanation is brief, but it is intelligible. Further, given my finding under ground 2 that the word "damage" within the IA's ToR does not include compensation for legal costs, it follows there was no prospect of receiving such costs. I am satisfied, therefore, that it is highly likely the outcome would not have been substantially different.

66. In respect of ground 3, it is artificial to suggest that no proper reasons were provided by the Chief Ombudsman, Ms Thomas, for accepting the IA's recommendation. The ToR understandably required reasons to be provided if the IA's recommendation was not accepted, but if it was otherwise they only required notification of the acceptance. In those circumstances, it is understood that the Chief Ombudsman's reasons are in essence the IA's reasons for the recommendation to her.

Conclusion on ground 4 (decisions 2 and 3 were procedurally unfair)

67. In respect of decision 1 (Mr Lane's decision of 19 August 2022), I find that it is arguable that the absence of any reasons for rejecting the request for payment of legal costs is a procedural failing. However, I still refuse permission under section 31(3D) of the Senior Courts Act 1981 on the basis that it is highly likely the outcome would not have been substantially different. I find no procedural failings in respect of decisions 2 and 3. Therefore, even if the decisions were amenable to judicial review, I would still refuse permission on this fourth ground.

Ground 5: the decisions were Wednesbury unreasonable

68. Under ground 5, the claimant submits all three decisions were Wednesbury unreasonable as this was "plainly an appropriate case" for deciding that the defendant should pay some or all of the claimant's reasonable costs.

Conclusion on ground 5 (the decisions were Wednesbury unreasonable)

69. Given the findings I have made above, it will come as no surprise that notwithstanding the issue of amenability, I would still refuse permission for this fifth ground. Whilst the claimant made errors, apologised and offered compensation for the inconvenience caused from its poor service, as I have explained above the claimant's legal costs were never recoverable for its engagement in the statutory consumer complaint scheme. Similarly, there was no provision to recover legal costs as "damage" under the non-statutory service complaint scheme. Mr Malcolm's 3 October 2019 email was clumsy and inappropriate, but I do not find that it was a "threat [that] was unfair and unreasonable, an abuse of the FOS's position and an exercise in high-handedness." The evidence does not support the claimant's assertion that the defendant "doggedly, and without reason, pursued an entirely meritless complaint against the claimant." The fact that the IA was employed by the defendant does not mean that she is not independent from the Chief Executive and Chief Ombudsman. Given my findings, in my judgment there is no justifiable basis to conclude that any of the three decisions was Wednesbury unreasonable in the circumstances. I would also refuse permission under section 31(3D) of the Senior Courts Act 1981 on the basis that it is highly likely the outcome would not have been substantially different, for reasons I have already explained.

Overall conclusion

70. I find this claim is not amenable to judicial review. Even if it was so amenable, I would refuse permission on all five grounds for the reasons I have explained. I would also refuse permission under section 31(3D) of the Senior Courts Act 1981 on the basis that it is highly likely the outcome would not have been substantially different.